75-1912

FILED

JUN 2 1976

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. _____

IN RE HARLAN H. ROSS

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

Daniel J. Connolly, Esquire
Attorney
Robbins & Bradley, P.A.
41 Lebanon Street
Hanover, New Hampshire 03755
603-643-2727

Dated: June 1976

TABLE OF CONTENTS

Jurisdictional Statement 1

Opinion Below 2

Jurisdiction 2

Question Presented 3

Statutes Involved 3

Statement 3

The Questions are Substantial 9

Appendix A - Opinions, Orders and Modification of Court Below A-1

Appendix B - Statutes Involved B-1

Appendix C - Excerpts from Brief of Appellant in Court Below C-1

TABLE OF AUTHORITIES

Cases:

Department of Mental Hygiene v. Hawley, 59 Cal2d 247, 379 P2d 22 11

Hoffman v. Pursue, Ltd., 420 US 592 2

James v. Strange, 407 US 128 10

Levy v. Louisiana, 391 US 68 .... 10, 13

McAuliffe v. Carlson (D.C. D.Conn.), 377 FSupp 896 14

Memorial Hospital v. Maricopa County, 415 US 250 13

Palmer v. Thompson, 403 US 217 13

Reed v. Reed, 404 US 71 10

Rinaldi v. Yeager, 384 US 305 .2, 10, 13

Salinger v. Superintendent of Spring Grove Hospital, 206 Md 623, 112 A2d 907 11

Weber v. Aetna Casualty & Surety Co., 406 US 164 ..... 10, 14

Statutes and Constitutions:

N.H. R.S.A. §8:43 ..... 3, 5, 6, 8, 9, 10, 12, 13, 14

N.H. R.S.A. §607:1 10

N.H. R.S.A. §607:2 ..... 3, 10

N.H. R.S.A. §607:3 ..... 3, 5, 6, 7, 9, 10, 11, 12, 13

N.H. R.S.A. §651:9 9

Title 28, United States Code, §1257(2) 2

United States Constitution, Fourteenth Amendment 6, 8, 13, 14

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1975

No. ____

IN RE HARLAN H. ROBB

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of New Hampshire, denying appellant's motion for rehearing, entered on 31 March 1976, in connection with an opinion of the court below, entered on 27 February 1976, holding a state statute to be valid in the face of a challenge by the

appellant that, in its application to the ward of the appellant, the statute is repugnant to the Equal Protection Clause of the Fourteenth Amendment. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the court below, in this case, is reported in 354 A2d 408. The opinion of the court below in In the Matter of John H. Sargent, a companion case to which reference is necessary to ascertain the grounds of judgment in the case appealed, is reported in 354 A2d 404. Copies of the opinions in these cases, the orders entered, and the modification to the opinions are attached as Appendix A hereto.

JURISDICTION

The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The jurisdiction of the Supreme Court to review the decision on direct appeal is supported by Hoffman v Pursue, Ltd., 420 US 592 at 605, rehearing denied 421 US 971; Rinaldi v Yeager, 384 US 305.

QUESTION PRESENTED

Whether New Hampshire Revised Statutes Annotated, Chapter 8, Section 43, is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the extent that it imposes on a person committed to the New Hampshire Hospital as criminally insane, pursuant to RSA §607:3, financial liability for his care, treatment and maintenance, while not imposing similar financial liability on a person committed to the State Prison as criminally insane, also pursuant to RSA §607:3.

STATUTES INVOLVED

New Hampshire Revised Statutes Annotated (RSA), sections 8:40, 8:43, 607:1, 607:2, 607:3, 651:9, and 651:9-a, are set forth in Appendix B hereto.

STATEMENT

On 7 May 1973, Harlan H. Robb, the ward of the appellant, Daniel J. Connolly, was indicted for the crime of murder in the first degree. After entry of a common law plea of not guilty on arraignment, Mr. Robb was permitted to enter a statutory plea of not guilty by reason of insanity (RSA §607:2) on 20 December 1973. This plea was accepted by the State and the Grafton County Superior Court. Pursuant to RSA §607:3,

the Superior Court entered the following order:

> The Court is of the opinion and so finds that it would be dangerous for Harlan H. Robb to go at large. It is therefore considered by the Court that the said Harlan H. Robb be committed to the New Hampshire Hospital for life until, or unless, earlier discharged, released or transferred by due course of law, however, he shall not be released, paroled, discharged or otherwise permitted to depart from the physical custody or facilities of the New Hampshire Hospital, either temporarily or permanently, except on order of the Superior Court.

On 10 January 1975, appellant was appointed conservator of the estate of Mr. Robb, pursuant to Mr. Robb's petition of 13 December 1974 requesting the appellant's appointment as conservator.

In August 1975, the State of New Hampshire sought reimbursement from the assets of Mr. Robb, in the hands of the appellant, for the expenses of maintaining Mr. Robb at the New Hampshire Hospital. The amounts sought were $4,252.50 for the period from 20 January 1974 through 30 November 1974 and $8,215.00 for the period from 1 December 1974 through 30 June 1975. The appellant,

as conservator for Mr. Robb, petitioned the Grafton County Probate Court for instructions concerning the liability of the assets in the appellant's hands for the amounts demanded. Pursuant to appropriate statutes, the Grafton County Probate Court transferred to the Supreme Court of the State of New Hampshire the following question:

> Pursuant to RSA Chapter 8 (as amended), can the State of New Hampshire recover from a person or his estate, expenses for board and care furnished to said person by the State of New Hampshire during said person's commitment to the New Hampshire Hospital pursuant to order of the Superior Court upon acceptance by the State and the Court of a plea of not guilty by reason of insanity to a charge of first degree murder?

Appellant challenged the validity of RSA §8:43 along two lines: (1) that the terms "patient" and "inmate", as used in RSA §8:43, were not intended by the New Hampshire legislature to encompass those committed to the New Hampshire Hospital as criminally insane, pursuant to RSA §607:3; and (2) that the attempt to impose financial liability upon those committed to the New Hampshire Hospital as criminally insane, pursuant to RSA §607:3, while not imposing financial liability upon those committed to the

State Prison as criminally insane, also pursuant to RSA §607:3, renders RSA §8:43 repugnant to the Equal Protection Clause of the Fourteenth Amendment.

The court below, in its opinion in In the Matter of John H. Sargent, disposed of the first line of attack by holding that the words "patient" and "inmate" had a common-sense meaning and were sufficiently inclusive and well understood to bring Mr. Robb within the ambit of the fair meaning of RSA §8:43.

As to the second line of attack, appellant, in his petition to the Grafton County Probate Court, alleged:

> 6. That your Petitioner believes that the State of New Hampshire cannot constitutionally compell Mr. Robb or his estate to reimburse the State for the expenses of his care and maintenance at the New Hampshire Hospital, while not recovering in a similar fashion from other persons similarly situated without violating Mr. Robb's right to equal protection of the law, as guaranteed by the New Hampshire Constitution and the Constitution of the United States.

Upon transfer of the reserved question to the court below, the appellant continued to press this second line of attack by brief and oral argument. The

pertinent portions of the appellant's brief are set forth in Appendix C hereto.

The court below, in its opinion of 27 February 1976, while acknowledging that if persons found to be criminally insane and dangerous to go at large were first committed to State Prison, then transferred to the New Hampshire Hospital, and there permitted to avoid financial liability, it "would raise serious constitutional questions," held, nevertheless, that all persons found to be criminally insane and dangerous to go at large would be financially liable for their board and care at the New Hampshire Hospital without regard to whether their commitment was direct or indirect (after initial commitment to the State Prison) --and that no equal protection violation existed.

Appellant filed a timely motion for rehearing, which alleged:

> 4. That your petitioner by brief.... and at oral argument urged that by seeking reimbursement from those committed pursuant to RSA §607:3, and its successors, to the State Prison or houses of correction (with no subsequent transfer to the State Hospital), the State is impermissibly discriminating among those in the class which consists of those

criminally insane and found by the Superior Court to be dangerous to be at large.

5. That the Court has construed RSA §8:43 and RSA §651:10 to permit recovery from the assets of criminally insane individuals transferred from the State Prison to the State Hospital, but the Court's opinions in this case and in Sargent do not appear to address the question presented by your petitioner, mainly, whether discrimination occurs when those criminally insane who are confined at the State Hospital at any time are liable for their own support at that facility (for the period they are confined there), while those criminally insane who are confined at the State Prison at any time are not liable for their own support at that facility, denying persons in the position of Mr. Robb equal protection of the laws guaranteed by the Fourteenth Amendment to the U.S. Constitution.

The court below, by order entered 31 March 1976, denied a rehearing and modified its opinions entered 27 February 1976 by addition of the following language to the opinion in In the Matter of John H. Sargent:

The legislature is also entitled to

find that it is more desirable and beneficial to be committed to the hospital than to the prison. There is thus a rational basis for not charging those confined to the prison who by reason of insanity have not been indicted, are found not guilty or plead not guilty.

This appeal has followed, from the order of the court below denying a rehearing upon the grounds alleged in appellant's motion for rehearing.

THE QUESTIONS ARE SUBSTANTIAL

In the agreed statement of facts, which was a part of the record in the court below, the State of New Hampshire and the appellant agreed that as of 11 February 1975, 160 persons committed to the New Hampshire Hospital had been committed pursuant to RSA §607:3 or its successor RSA §651:9. Of these persons, 132 had been committed by the Superior Court. Each of these individuals, or their assets, are liable for the expenses incurred by the State of New Hampshire, if RSA §8:43 is upheld in the face of the appellant's challenge that the statute is repugnant to the Equal Protection Clause of the Fourteenth Amendment.

1. There is no serious controversy that the applicable standard against

which RSA §8:43 must be measured is whether the classification created by the New Hampshire legislature bears some rational relationship to a legitimate state purpose, Rinaldi v Yeager, 384 US 305; Levy v Louisiana, 391 US 68; Weber v Aetna Casualty & Surety, Co., 406 US 164; James v. Strange, 407 US 128; and that the classification must rest on grounds of difference having a fair and substantial relation to the object to the legislation, so that all persons similarly circumstanced shall be treated alike, Reed v Reed, 404 US 71.

2. The court below acknowledged that to permit criminally insane individuals committed to the State Prison initially, pursuant to RSA §607:3, and subsequently transferred to the New Hampshire Hospital, to be exempt from payment "would raise serious constitutional questions." But the court below did not look beyond what it apparently felt to be the class with which RSA §8:43 purports to deal -- "patients," "inmates," or, more properly, residents of the New Hampshire Hospital. The appellant has repeatedly advanced that the pertinent class for purposes of testing the validity of RSA §8:43 is that group of individuals who have not been indicted by reason of insanity, have been found not guilty by reason of insanity, or pleaded not guilty by reason of insanity, pursuant to RSA §§607:1 and 607:2, and their

successors; and have been found to be dangerous to go at large, pursuant to RSA §607:3, and its successor.

When appellant urged this class as the appropriate class, specifically in his brief at p. 25 (as set forth at C-5 and C-6 of Appendix C hereto) and in his motion for rehearing (as quoted above), the court below implicitly acknowledged the classification as accurate by ordering a modification of its original opinion, claiming a rational basis for the attachment of financial liability to those committed to the New Hampshire Hospital pursuant to RSA §607:3, in that "[t]he legislature is also entitled to find that it is more desirable and beneficial to be committed to the hospital than to the prison." (See Appendix A.)

3. Although there are no New Hampshire cases dealing with the nature and objectives of commitment of the criminally insane, the appellant argued to the court below that the primary purpose for commitment was protection of the public in the course of administration of laws prohibiting crime, Department of Mental Hygiene v Hawley, 59 Cal2d 247, 379 P2d 22, and because permitting the committed person to go at large is not safe for him or the community, Salinger v Superintendent of Spring Grove Hospital, 206 Md 623, 112 A2d 907. The

court below, nevertheless, did not address itself to the nature and objects involved in commitment of the criminally insane, pursuant to RSA §607:3.

When the legitimate state purpose of isolating the criminally insane from the public, for the protection of the person committed and the public, is analyzed in light of the opinion of the court below that a distinction as to financial liability can be said to have a rational basis that it is "more desirable and beneficial to be committed to the hospital than to the prison," it is obvious that the court below has espoused a rational basis which has no relation to the legitimate state purpose which underlies a commitment statute such as RSA §607:3.

4. By construing "patient" and "inmate" as used in RSA §8:43 as encompassing the criminally insane committed in the course of criminal proceedings, pursuant to RSA §607:3, and addressing itself only to the financial liability of those who at any point became "patients" or "inmates" of the New Hampshire Hospital, the court below has highlighted an apparent concern for maximizing the reimbursement to the State of New Hampshire and thereby protecting the public fisc, through an invidious distinction among individuals in the appropriate class of those crim-

inally insane and found to be dangerous to be at large. See Memorial Hospital v Maricopa County, 415 US 250 at 263; Palmer v Thompson, 403 US 217 at 226.

5. When the appropriate class -- the criminally insane who have been found to be dangerous to be at large -- is considered, there is no rational basis which has been espoused or can be espoused for attaching financial liability to those committed to or eventually residing at the New Hampshire Hospital, while not attaching financial liability to those committed to the State Prison, when all commitments are pursuant to RSA §607:3, a statute which does not provide the committing court any standards concerning the alternatives in commitment. RSA §8:43, in its application to the ward of the appellant, is therefore repugnant to the Equal Protection Clause of the Fourteenth Amendment.

This Court has found similar lacks of rational bases where a state sought to require reimbursement of expenses of furnishing appeal transcripts to institutionalized, convicted indigents while not requiring reimbursement from other convicted indigents, Rinaldi v Yeager, supra; where a state sought to bar illegitimate children from bringing wrongful death actions which were allowed to legitimate children, Levy v Louisiana, supra; and where a state sought to

deny workmen's compensation benefits to illegitimate children, to which legitimate children were entitled, Weber v Aetna Casualty & Surety Co., supra.

In the only case which appellant has been able to locate bearing on similar issues, the U.S. District Court for the District of Connecticut ruled in McAuliffe v Carlson, 377 FSupp 896, that the Equal Protection Clause of the Fourteenth Amendment was violated by a state statutory scheme which rendered male jail occupants transferred to the state mental hospital financially liable for hospital expenses, while not imposing financial liability on other males transferred from other institutions or any females transferred from any correctional institutions.

The court below having upheld the validity of RSA §8:43 in the face of appellant's challenge that said statute, in its application to the ward of the appellant, is repuguant to the Equal Protection Clause of the Fourteenth Amendment, and for the reasons set forth above, the appellant believes that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

Daniel J. Connolly

Daniel J. Connolly, Esquire
Appellant
Stebbins & Bradley, P.A.
41 South Park Street 03755
603-643-3737

Dated: 30 June 1976

APPENDIX A

The following order and opinion were entered on 27 Feburary 1976 in the case being appealed:

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 7414 In re Harlan H. Robb the court upon February 27, 1976, made the following order: Remanded.

George S. Pappagianis,
Clerk,

Concord,
February 27, 1976

* * * *

Grafton County Probate Court
No. 7414

In re Harlan H. Robb

February 27, 1976

[116 NH , 354 A2d 408]

PER CURIAM. Upon an agreed statement of facts, the following question of law was reserved and transferred prior to trial from the Grafton County Probate Court pursuant to RSA 547:30 (Jones, J.)

> "Pursuant to RSA Chapter 8 (as amended), can the State of New Hampshire recover from a person or his estate, expenses for board and care furnished to said person by the State of New Hampshire during said person's commitment to the New Hampshire Hospital pursuant to order of the Superior Court upon acceptance by the State and the Court of a plea of not guilty by reason of insanity to a charge of first degree murder?"

This question is asked in light of the following fact: On May 7, 1973, Harlan H. Robb was indicted by the Grafton County Grand Jury of the crime of murder in the first degree. RSA 585:1. Upon arraignment before the superior court, Mr. Robb entered a plea of not guilty. On December 20, 1973, he was permitted to withdraw his not guilty plea and was permitted to enter a plea of not guilty by reason of insanity. This plea was accepted by the Superior Court (Perkins, J.) after the presentation of expert psychiatric testimony concerning Mr. Robb's sanity at the time of the alledged events and at the time of the hearing. Pursuant to RSA 607:3 (reenacted

as RSA 651:9 (Supp. 1975)), Mr. Robb was committed to the New Hampshire Hospital. At that time, the superior court issued the following order:

> "The Court is of the opinion and so finds that it would be dangerous for Harlan H. Robb to go at large. It is therefore considered by the Court that the said Harlan H. Robb be committed to the New Hampshire Hospital for life until, or unless, earlier discharged, released or transferred by due course of law, however, he shall not be released, paroled, discharged, or otherwise permitted to depart from the physical custody or facilites of the New Hampshire Hospital, either temporarily or permanently, except on order of the Superior Court."

On January 10, 1975, pursuant to RSA 464:17, Daniel J. Connolly was appointed conservator of the assets of Halan H. Robb by the Grafton County Probate Court. In August 1975, the State of New Hampshire sought reimbursement from the assets of Mr. Robb for his board and care at the hospital. The amounts sought are $4,252.50 for the period from January 20, 1974, through November 30, 1974, and $8,215 for a period from December 1, 1974, through June 30, 1975. The assets of Mr. Robb are sufficient to satisfy these amounts.

Mr. Connolly has petitioned the Grafton County Probate Court for instructions concerning his liability as conservator of Mr. Robb's assets for the amounts in question and any future amounts demanded by the State of New Hampshire on behalf of the New Hampshire Hospital.

Specifically, plaintiff contests the reimbursement charge on two grounds: (1) The legislative history of RSA 8:43 (Supp. 1975) allowing reimbursement for State expenses incurred in maintenance of the New Hampshire Hospital indicate that it is the policy of the State of New Hampshire to refrain from charging those committed to the Hospital, such as Mr. Robb, for the cost of their commitment; and (2) the attempt by the State of New Hampshire to recover such expenses for board and care furnished at the New Hampshire Hospital during a person's commitment pursuant to an order of the superior court violates that person's constitutional right to equal protection of the law.

The plaintiff's contentions have been decided adversely to him in No. 7168, In the Matter of John H. Sargent, 116 N.H. , decided this day. The question transferred is therefore answered in the affirmative.

Remanded.

* * * *

The following opinion was entered on 27 February 1976 in In the Matter of John H. Sargent, a companion case to which reference is necessary to ascertain the grounds of judgment in the case appealed:

Merrimack County Probate Court
No. 7168

In The Matter of John H. Sargent

February 27, 1976

[116 NH , 354 A2d 404]

PER CURIAM. Upon an agreed statement of facts, the following question of law was reserved and transferred prior to trial from Merrimack County Probate Court (Cushing, Jr.):

> "Can the State of New Hampshire recover from a patient, pursuant to RSA Chapter 8(as amended), board and care expenses furnished to one committed to the New Hampshire Hospital pursuant to RSA 607:3 (repealed and reenacted as RSA 651:9; see laws of 1971, 518.1)?"

Decision has been delayed to await arguments in In re Robb No. 7414 decided this day. The question is asked in

light of the following facts: John H. Sargent on April 21, 1965, was bound over from New London Municipal Court to Merrimack County Superior Court to await the action of the grand jury after having been charged with murder. On April 22, 1965, Mr. Sargent was committed to the New Hampshire Hospital for observation pursuant to RSA 135:17 (1964). On June 8, 1965, the hospital certified that Sargent was mentally ill and lacked the requisite mental competence for criminal responsibility. On October 19, 1966, the grand jury failed to return an indictment and Sargent was committed directly to the New Hampshire Hospital pursuant to RSA ch. 607 (re-enacted as RSA 651:9 (Supp. 1975)). At that time, the superior court issued the following order:

> "The court being of the opinion that it will be dangerous should the Repondent go at large, orders that the Respondent be committed to the New Hampshire Hospital for life, there to remain until or unless earlier discharged, released or transferred by due course of law."

After Sargent's commitment, Forest W. Kimball was appointed his guardian and served in that capacity until July 3, 1973, when the guardianship was terminated by the Merrimack County Probate Court. While acting as guardian, Kim-

ball received Sargent's monthly social security disability benefits and Veteran's Administration pension payments and made payments to the hospital for the board and care of his ward. RSA 8:40; :43 (Supp. 1975); Annot., 63 A.L.R. 3d 780, sec. 7(a) (1975). Payments already made total $6,325 for the seven years Sargent was hospitalized. In September of 1972, upon advice of counsel, the guardian stopped making payments for the board and care of his ward. The balance of $180.85 remaining in the hands of the guardian is claimed both by the State and by Sargent. Pending a decision of this court, the funds were placed in escrow.

Since payment for board and care rendered has been made through July 3, 1973, the State apparently is seeking to apply the remaining $180.85 in the custody of the guardian from that time to Sargent's release. Furthermore, it is the State's position that this final charge is considerably below the actual value of the services rendered to the plaintiff. Moreover, it is the State's contention that "[i] n determining whether patients are liable for their board and care, the State applies a general rule that all persons committed to the hospital in the first instance are chargeable, assuming they have the ability to pay." RSA 8:43 I (Supp. ;075). Psychiatric evaluations pursuant

to RSA 135:17 (1964) are an exception to the general rule. Prisoners transferred from prison or county jails are non-chargeable. RSA 651:10 (Supp. 1975).

Essentially, plaintiff contests the charge of $180.85 on three grounds which are: (1) RSA 8:43 (Supp. 1975) which permits the State to recoup expenses incurred while at the State hospital does not apply to this plaintiff because of the statutes and their legislative history; (2) if the statute does apply, then its application violates equal protection of the laws (U.S. CONST. amend. XIV) since it discriminates against those criminally incarcerated at the hospital because it extracts the cost of incarceration while not doing so for those first committed to the State prison and then transferred to the hospital or in other select circumstances and finally (3) if the statute does apply and does not violate equal protection, then in order to exact costs of incarceration the quid pro quo necessary would be the providing of effective and adequate treatment, which was not so provided. We reject all these claims.

RSA 8:40 (Supp. 1975) and 8:43 (Supp. 1975) when read together require that the". . . business supervisor shall. . . review and investigate . . . expenses incurred by patients receiving care,

treatment or maintenance . . . and make recommendations to the respective boards of trustees. . . of such institutions. . . as to the rates to be charged for the care, treatment and maintenance of such patients or inmates. . . ." RSA 8:40 (Supp. 1975). "[T] he state is entitled to recover the expense of care, treatment and maintenance of any patient or inmate at" the State hospital. RSA 8:43 (Supp. 1975).

As already mentioned, certain statutory exceptions to this general rule of requiring payment exist. While legislative intent may be difficult to discern (See R. Dickerson, The Interpretation and Application of Statutes, 69-71 (1975)) the words "patients" and "inmates" have a common sense-meaning, and are sufficiently inclusive and well understood to bring Sargent within the ambit of the statute's fair meaning. Moreover, the legislature has acquiesced in the longstanding and practical application of the statutes whereby the State held all those committed directly to the hospital to be liable for payments unless expressly excluded. This plaintiff did not come within any exception. Acquiescense in the interpretation of the statutes, coupled with the fair import of the words' meanings, indicate plaintiff was intended to be covered by RSA 8:40, :43 (Supp. 1975). See New Hampshire Retail Grocers Ass'n

v. State Tax Comm'n, 113 N.H. 511, 515, 309 A.2d 890, 89192 (1973); 2A Sutherland, Statutory Construction secs. 49:03; 49:05; 49:10 (4th ed. rev. C. Sands 1973, Supp. 1975).

Plaintiff next claims that the provisions of the recoupment statute deny him equal protection of the laws. Under the terms of RSA 651:8, a grand jury may omit to find an indictment or petit jury may acquit a person for the reason of insanity or mental derangement. Such a person, who is not indicted or who is acquitted by reason of insanity, may be committed to the prison or the state hospital if the court is of the opinion that it is dangerous for such person to go at large. RSA 651:9 (Supp. 1975). Plaintiff claims that neither prisoners (persons convicted and under sentence) nor those not indicted nor who are acquitted by reason of insanity who go first to the prison and then are transferred to the hospital, are required by the statute to pay. Although we agree that prisoners are not required to pay, we do not agree that this is so as to the others and thus find no denial of equal protection.

Absent some fundamental right or suspect classification, the equal protection test to be applied is whether there is a rational basis for distinguishing between groups who are treated

differently. Belkner v. Preston, 115 N.H. 15, 332 A.2d 168(1975). Plaintiff was committed to the hospital to protect him as well as society, thus furnishing a basis for the application of the rational basis test. See e.g., Jefferson v. Hackney, 406 U.S. 535 (1972); McGowan v. Maryland, 366 U.S. 420, 426 (1961).

There is a rational basis for distinguishing between persons in Sargent's position and prisoners who have been convicted, sent to the prison and then transferred to the hospital. They are still prisoners even while at the hospital and when hospitalization is no longer necessary or desirable as to them they are not discharged but must return to the prison under their sentence. The legislature could rationally conclude that such prisoners should be kept at the expense of the State when transferred to the hospital while those in Sargent's position should pay if able. (*) See Kough v. Hoehler, 413 Ill. 409, 109 N.E.2d 177 (1952); Colorado v. Estate of Burnell, 165 colo. 205, 439 P. 2d 38, appeal dismissed, 393 U.S. 13 (1968).

RSA 651:10 (1974) provided that:

"The governor and council or the superior court may discharge any such person from prison, or may transfer

any prisoner who is insane to the state hospital, to be there kept at the expense of the state, whenever they are satisfied that such discharge or transfer will be conducive to the health and comfort of the person and the welfare of the public . . . ."

The State acknowledges in its brief in Robb supra that if persons who by reason of insanity are not indicted, or are acquitted, or permitted to plead not guilty for this reason and are first committed to the prison and then transferred to the hospital are exempt from payment it would be "unjust, illogical, and perhaps unconstitutional." We agree that such a construction would raise serious constitutional questions. Statutes should be construed when possible to avoid unjust consequences. Doe v. State, 114 N.H. 714, 328 A.2d 784 (1974); Chaloux v. Chaloux Oil Co., 103 N.H. 538, 176 A. 2d 192 (1961).

The words "any such person" in RSA 651:10 (1974) referred to persons who have not been indicted or have been acquitted by reason of insanity and who have been found to be dangerous to go at large and have been committed to the prison. RSA 651:8 and 9(Supp. 1975). The term prisoner referred to one in the prison under a criminal sentence. The words "to be there kept at the expense

of the state" referred to the prisoners who had been transferred to the hospital and not to those covered by section 8 and 9. All persons who are not indicted or who have been acquitted or have pleaded not guilty by reason of insanity who are in the hospital, by whatever route they arrived there, are chargeable for their board and care and no equal protection violation exists.

Plaintiff's final argument that charges for services rendered at the hospital withoutthe quid pro quo of treatment avails him nothing in this case. Reduction in treatment over the years and his final release into the community demonstrates the adequacy and success of the treatment provided. The reasonable ness of the charge is not before us. If persons committed because it is dangerous that they go at large are entitled to"minimally adequate treatment" as contended by Sargent (See O'Connor v. Donaldson, 422 U.S. 563, 58089 (1975) (Burger, C.J., concurring)), the record before us demonstrates that he received such treatment.

Remanded.

* * * *

Upon appellant's filing of a Motion for Rehearing, the following order and opinion were entered on 31 March 1976 in the case being appealed:

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 7414 In re Harlan H. Robb the court upon March 31, 1976 made the following order: Motion for rehearing denied.

George S. Pappagianis,
Clerk,

Concord,
March 31, 1976

In re Harlan H. Robb

March 31, 1976

The motion for rehearing is denied. See modification of opinion In the Matter of John H. Sargent which adds before the citations in the second paragraph on page 4 [at (*) on page A-11 hereof] the following sentences: "The legislature is also entitled to find that it is more desirable and beneficial to be committed to the hospital than to the prison. There is thus a rational basis for not charging those confined to the prison who by reason of insanity have not been indicted, are found not guilty or plead not guilty."

APPENDIX B

The following statutes, or pertinent portions thereof, are referred to in this statement:

RSA §8:40 Duties. Subject to the direction and supervision of the comptroller the business supervisor shall (1) review and investigate all records of the New Hampshire Hospital, . . . relative to expenses incurred by patients at such institutions, . . . and make recommendations to the respective boards of trustees or commissions of such institutions, . . . as to the rates to be charged for the care, treatment and maintenance of such patients or inmates, (2) investigate the ability of patients and inmates of such institutions . . . to pay for such care, treatment and maintenance and recommend to the respective boards of trustees or commissions of such institutions, . . . the rate to be charged, . . .

* * * *

RSA §8:43 Recovery of Expenses.

I. . . . the state is entitled to recover the expense of care, treatment and maintenance of any patient or inmate at any of the institutions named in RSA 8:40 . . . from the patient or inmate,

if of sufficient ability to pay, or his estate, . . .

II. Recovery of the past due expense of care, treatment, and maintenance of a patient or inmate in any of the institutions named in RSA 8:40 is limited in amount as follows:

> (a) If he is living and is a resident of the institution, recovery is limited to the expense incurred within the last five years of his residence at the institution . . .

* * * *

RSA §607:1 Certificate of Jury, Whenever the grand jury shall omit to find an indictment against a person prosecuted for an offense shall be acquitted by the petit jury for the same reason, such jury shall certify the same to the court. [Since repealed, Laws of 1971, Chapter 518, effective 1 November 1973.]

* * * *

RSA §607:2 Plea of Insanity. Any person prosecuted for an offense may plead that he is not guilty by reason of insanity or mental derangement, and such plea may be accepted by the state's counsel, or may be found true by the verdict of the jury. [Since repealed,

Laws of 1971, Chapter 518, effective 1 November 1973.

* * * *

RSA §607:3 Committal. In either of the cases aforesaid the court, if it is of opinion that it will be dangerous that such person should go at large, may commit him to the prison or to the state hospital, there to remain until he is discharged by due course of law. [Since repealed, Laws of 1971, Chapter 518, effective 1 November 1973.]

* * * *

RSA §651:9 Committal. In either of the cases aforesaid [RSA §651:8 and RSA §651:8a, which provide for certification of a jury and pleas of insanity, in substantially same language as previous RSA §607:1 and RSA §607:2] the court, if it is of opinion that it will be dangerous that such person should go at large, may commit him to the prison or to state hospital for life until or unless earlier discharged, released, or transferred by due course of law. [This section is currently in effect, but it shall be repealed when the superintendent of the New Hampshire hospital certifies to the secretary of state that the forensic psychiatric unit building and equipment are completed and placed in operation. Laws of 1975, Chapter 388, Section 8.]

* * * *

RSA §651:9a Committal. In either of the cases aforesaid the court, if it is of the opinion that it will be dangerous that such person should go at large, shall commit him to the state hospital for life until or unless earlier discharged, released or transferred by due course of law. [This section shall become effective upon repeal of RSA §651:9, as previously noted.]

APPENDIX C

Those portions of the appellant's brief in the court below, in which the appellant urged the repugnancy of the state statutory scheme to the Equal Protection Clause of the Fourteenth Amendment, are as follows:

The question of equal protection of the laws as guaranteed by the 14th Amendment to the U.S. Constitution and the New Hampshire Constitution, Part 1, Article 12, in this case, centers around the issue of whether the criminally insane, committed directly to the New Hampshire Hospital, are subjected to impermissible discrimination when the State seeks to recover from them the expenses incurred by the State in furnishing their maintenance. [p. 13] . . .

Whereas civil commitments proceed through the Probate Court system, with ultimate disposition, in the form of release, partial release or continued commitment, determined by the professional staff through the exercise of its professional judgment; the commitment and disposition of individuals, who have been involved in conduct which would otherwise be criminal in nature, is through Superior Court proceedings, which remain subject to the supervision

and control of the Superior Court, not the professional staff of the New Hampshire Hospital. The criminally insane, therefore, are not dealt with in the same manner as those who have been committed through civil process. [pp. 17-18] . . .

The dual objectives of involuntary confinement for those individuals who have been involved in criminal conduct are (1) to isolate the particular individual from society for the protection of the individual, society, or both; and (2) to rehabilitate or treat the individual involved in order to hasten his return to constructive participation in society, if this is possible.

As these objectives relate to those persons who are found to possess the appropriate mental capacity to be held responsible for their actions. . . . these purposes are obvious. Isolation, in connection with sentences of less than a year is accomplished in various county houses of correction, . . . while in connection with longer terms the State Prison is employed. The purpose of rehabilitation or reformation is not only set forth by statute, ... but is constitutionally guaranteed in New Hampshire.

There are no cases in New Hampshire dealing specifically with these dual

objectives as they relate to those who are found to be criminally insane and dangerous to be at large whether the disposition involves commitment to the State Prison or commitment to the New Hampshire Hospital.

Several other jurisdictions, though, have passed upon the nature of the confinement for the criminally insane. It was held in Department of Mental Hygiene v. Hawley, 59 Cal2d 247, 379 P2d 22 at 27 (1963) that a person who is committed to a state institution under a statutory provision relating to pre-trial determination of competency to stand trail for criminal charges, " is held for the primary purpose of protection of the public in the course of administration of laws prohibiting crime. [pp. 20-21] . . .

In seeking to protect an individual from his own actions, or to protect society from the actions of the individual, where in the past there have been actions which would have given rise to criminal liability if the person were responsible under the appropriate legal tests, . . . the State of New Hampshire can impose restrictions on the activities of an individual. The manner in which these restrictions have been imposed in New Hampshire, when the reason for which the individual has been brought before the Superior Court is

related to what would otherwise be criminal activity, has involved RSA §607:3 . . . .

This transfer does not challenge the propriety of a commitment pursuant to RSA §607:3 or its successors upon a finding that it would be dangerous for the individual to go at large, . . . This protection for society, to the disadvantage of Mr. Robb, involves a legislatively-expressed belief that if a criminally insane person may at some indeterminate time repeat his conduct or cause some other damage, then he may be involuntarily confined in a manner similar to a person actually convicted of criminal activity. [p. 22] . . .

The fact remains that Mr. Robb was indicted by the Grafton County Grand Jury of murder in the first degree; he was subject to the jurisdiction of the Superior Court, not the Probate Court; his commitment to the New Hampshire Hsopital was pursuant to order of the Superior Court, not the Probate Court. His commitment is based upon a finding of potential danger to society, not upon mental incompetency, and again in December 1973. In fact, Mr. Robb was found in April 1974 to be capable of understanding the nature and purport of his petition for appointment of a conservator. Mr. Robb's eventual release, discharge or parole

is subject to disposition by the Grafton County Superior Court, not pursuant solely to determinations of the professional staff of the New Hampshire Hospital and its superintendent. Mr. Robb is not in the position of a person who has been found mentally incompetent pursuant to the. . . civil procedure. [p. 23] . . .

The Superior Court, upon acceptance of a plea of not guilty by reason of insanity, has three alternatives at the present time: (1) upon a finding that the person is not dangerous to society, releasing the person; (2) upon a finding that the person is dangerous to society, committing him to State Prison or county jails or houses of correction; and (3) upon a finding that the person is dangerous to society, committing him to the New Hampshire Hospital pursuant to statute. No criteria in connection with selection among these alternatives are mandated or provided. When the forensic unit at the New Hampshire Hospital is certified as completed, the second alternative will no longer be available. [p. 24]

In the event that the Superior Court selects the third alternative, commitment to the New Hampshire Hospital, the person's estate is alleged to become liable for the expenses incurred. If this is so, persons of the same class --

individuals who have had pleas of not guilty by reason of insanity accepted by the State and the Superior Court -- are subject to discriminatory treatment in relation to their assets. Those who per chance pass through State Prison first, before reaching the New Hampshire Hospital, are exempt from liability, while those who go directly to the New Hampshire Hospital must pay as they pass the doors of the hospital.

Although initially it would appear that Mr. Robb's residence at the New Hampshire Hospital is sufficient to subject him to financial liability pursuant to RSA 88:43, upon more thorough analysis it becomes apparent that he is not similarly situated with those patients or inmates of the New Hampshire Hospital who have been civilly committed to the Hospital. This situation raises serious questions concerning Mr. Robb's right to equal protection of the law.

It would be constitutionally permissible to impose liability upon prisoners for their maintenance, if their estates were sufficient to satisfy the claims, Auditor General v. Hall, 300 Mich 215, 1 NW2d 516 (1942). [p. 25] ...

In New Hampshire, we do not have similar statutes imposing liability upon both prisoners and insane persons without regard to their manner of commit-

ment, but looking only to the sufficienty of their assets.

In seeking to impose financial liability on Mr. Robb for the expenses incurred by it, the State of New Hampshire is discriminating against Mr. Robb since it does not seek reimbursement from other individuals who have had pleas of not guilty by reason of insanity accepted by the State and the Superior Court, but have been committed to the State Prison or houses of correction. This discrimination among those similarly situated is impermissible under the 14th Amendment to the U. S. Constitution and the New Hampshire Constitution, Part 1, Article 12. [pp. 2627]

Supreme Court, U. S.
FILED
AUG 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1917

IN RE HARLAN H. ROBB

ON APPEAL FROM THE SUPREME COURT

OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

David H. Souter
Attorney General

Roger G. Burlingame
Assistant Attorney General
Office of Attorney General
State House Annex
Concord, New Hampshire 03301

ATTORNEYS FOR APPELLEE

INDEX

Page

MOTION TO DISMISS OR AFFIRM 4
STATEMENT 4
ARGUMENT 6

A. THE QUESTION PRESENTED IS NOT SUBSTANTIAL 6
B. THE RECORD DOES NOT AFFIRMATIVELY DEMONSTRATE THAT THE FEDERAL QUESTION WAS PRESENTED TO AND DECIDED BY THE STATE COURT 9
C. THIS APPEAL IS OF DOUBTFUL VALUE AS A PRECEDENT 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Page

Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 10
Department of Mental Hygiene v. *Kirchner*,
60 Cal. 2d 716, 36 Cal. Rptr. 488, 388 P.2d 720 (1964);
vacated on other grounds and remanded,
380 U.S. 194 (1965), *on remand*, 62 Cal. 2d 586,
43 Cal. Rptr. 329, 400 P.2d 321 (1965) 7
In Re Harlan H. Robb, 116 N.H.____,
354 A.2d 408 (1976) 5,6
In The Matter of John H. Sargent, 116 N.H. ____,
354 A.2d 404 (1976) 5,6,9,10
Kaiser v. *State*, 80 Kan. 364, 102 P. 454 (1909) 7
Kough v. *Hoehler*, 413 Ill. 409, 109 N.E.2d 177 (1952) ... 7
Levy v. *Louisiana*, 391 U.S. 68 (1968) 7
Live Oak Ass'n. v. *R. R. Commission*,
269 U.S. 354 (1928) 10
Lynch v. *New York*, 293 U.S. 52 (1934) 10
McAuliffe v. *Carlson*, 377 F. Supp. 896 (1974) 7,8
Reed v. *Reed*, 404 U.S. 71 (1971) 9
Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 6,7,9
State v. *Clinch*, 108 N.H. 302, 234 A.2d 814 (1967) 9
State v. *Romme*, 93 Conn. 571, 107 A. 519 (1919) 7
United States Department of Agriculture v. *Moreno*,
413 U.S. 528 (1973) 9
Weber v. *Aetna Casualty and Surety Co.*,
406 U.S. 164 (1972) 7

STATUTES

NH RSA ch. 8, as amended, (Supp. 1975) 5,6
NH RSA 8:40 (Supp. 1975) 7
NH RSA 8:43 (Supp. 1975) 7,8,10
NH RSA 607:3 7,8,9
NH RSA 651:9 7,8,9,11
NH RSA 651:9a 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, §1 9

MISCELLANEOUS

N.H. Laws of 1975, Chapter 388, Section 8 8
Annot., 20 A.L.R.3d 363 (1968) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1917

IN RE HARLAN H. ROBB

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

Appellee, the State of New Hampshire, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Hampshire on the grounds that the decision below is correct, the question presented is not so substantial as to warrant further argument and for want of a properly presented substantial federal question.

STATEMENT

This is a direct appeal from a final judgment denying appellant's motion for rehearing, entered March 31, 1976 by the Supreme Court of the State of New Hampshire.

On December 20, 1973, Harlan H. Robb entered a plea of not guilty by reason of insanity to the charge of murder in the first degree having been indicted by a properly called Grand Jury. Subsequent to a full hearing concerning Mr. Robb's mental state at the time of the alleged murder and at the time of the hearing, he was committed to the New Hampshire Hospital

". . . for life until, or unless, earlier discharged. . . ."* Mr. Robb was committed on December 21, 1973, and remains at the hospital at the present time.

Pursuant to the authority of New Hampshire Revised Statutes Annotated (RSA) Chapter 8, (as amended) the State of New Hampshire sought reimbursement from the assets of Mr. Robb, for his care, treatment and maintenance provided by the State through the New Hampshire Hospital. Appellant, as conservator of Mr. Robb's estate requested instructions from the Probate Court concerning his liability as conservator for the payments due, and upon agreement of all parties, the matter was transferred to the Supreme Court of the State of New Hampshire for ruling. The question presented to that Court was:

> Pursuant to RSA Chapter 8 (as amended), can the State of New Hampshire recover from a person or his estate, expenses for board and care furnished to said person by the State of New Hampshire during said person's commitment to the New Hampshire Hospital pursuant to order of the Superior Court upon acceptance by the State and the Court of a plea of not guilty by reason of insanity to a charge of first degree murder?

In their decision dated February 27, 1976, *In re Harlan H. Robb*, 116 N.H.____, 354 A.2d 408, set forth in full in Appendix A to appellant's Jurisdictional Statement, the Court held that Mr. Robb's obligation to reimburse the State for care, maintenance and treatment did not violate his constitutional right to equal protection of the law, for reasons set forth *In the Matter of John H. Sargent*, 116 N.H. ____, 354 A.2d 404, decided on the same day.

---

*The full text of the Order of the Superior Court is as follows:
"The Court is of the opinion and so finds that it would be dangerous for Harlan H. Robb to go at large. It is therefore considered by the Court that the said Harlan H. Robb be committed to the New Hampshire Hospital for life until, or unless, earlier discharged, released or transferred by due course of law, however, he shall not be released, paroled, discharged or otherwise permitted to depart from the physical custody or facilities of the New Hampshire Hospital, either temporarily or permanently, except on order of the Superior Court."

Neither the language of the question transferred and answered by the Court nor the Court's opinion in *Robb* provide the reader with the specific allegations made in support of appellant's equal protection challenge. In the *Sargent* opinion, also set forth in full in Appendix A to appellant's Jurisdictional Statement, the Court noted that they were faced with an equal protection argument based on discrimination between those committed directly to the hospital and those comitted first to the prison and then transferred to the hospital. In holding that RSA Chapter 8 (as amended) required reimbursement from all patients at the hospital, even those first committed to the prison then transferred to the hospital, the Court found no denial of equal protection.

Appellant moved for rehearing in *Robb*. This motion was denied at which time the Court issued a modification of their opinion in *Sargent*. This modification is set forth in Appendix A to the Jurisdictional Statement.

ARGUMENT

A. THE QUESTION PRESENTED IS NOT SUBSTANTIAL

The question raised by this appeal is clearly not so substantial as to warrant further review by this Court. In his Jurisdictional Statement, appellant, in support of the contention that his question presented is substantial, cites a number of cases in which an equal protection challenge was raised and decided. As will appear from the following discussion, however, none of these cases deals with an enforceable obligation upon assets of inmates committed to mental institutions, either through criminal process or conventional civil commitment.

In *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), the Court was faced with a statutory scheme in which a state sought reimbursement for costs of appeal transcripts from one group of convicted indigents who had been unsuccessful on appeal, but not from another group of convicted indigents who had also been unsuccessful on appeal. Both groups enjoyed the benefit of having transcripts for appeal purposes but the obligation to make reimbursement for the cost of the transcript only attached to those who were incarcerated. The financial obligation imposed by the challenged statute was unrelated to the cost of incarceration and the Court found that a rational relation between the classification and the espoused public purpose, essential to support the classification, did not exist.

In both *Levy* v. *Louisiana*, 391 U.S. 68 (1968), and *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), the Court was asked to decide whether the denial to illegitimate children of certain rights enjoyed by legitimate children, was reasonably related to and served a valid public interest. The Court found an absence of a legitimate public interest in both cases and a resulting denial of equal protection.

In the case relied on by appellant as bearing on issues similar to those in the present case, the United States District Court for the District of Connecticut was faced with a statutory scheme which imposed a financial obligation for treatment received at a state hospital, on a certain group of males transferred from jail to the hospital, while not imposing the same obligation on females nor males transferred to the hospital from other correctional institutions. *McAuliffe* v. *Carlson*, 377 F. Supp. 896 (1974). Clearly this situation is not similar to that presented in this appeal.

New Hampshire Revised Statutes Annotated (RSA) Chapter 8 Section 43 provides in part that

> . . . the state is entitled to recover the expense of care, treatment and maintenance of *any* patient or inmate at any of the institutions named in RSA 8:40 . . . if of sufficient ability to pay. . . . [emphasis added]

The New Hampshire Hospital is an institution named in RSA 8:40. Pursuant to RSA 8:43, all patients at the hospital incur the same financial obligation, regardless of the method of becoming a patient. On its face, and unlike the statutes challenged in *Rinaldi*, *Levy*, *Weber*, and *McAuliffe*, RSA 8:43 does not discriminate between those similarly situated.

The legislature has made no distinction between those persons committed under RSA 607:3 (reenacted as RSA 651:9) and those committed under conventional civil commitments by a probate court. This is a valid exercise of the discretion vested in the legislature. *See Kaiser* v. *State*, 80 Kan. 364, 102 P. 454 (1909); *State* v. *Romme*, 93 Conn. 571, 107 A. 519 (1919); cf. *Kough* v. *Hoehler*, 413 Ill. 409, 109 N.E.2d 177 (1952); *Department of Mental Hygiene* v. *Kirchner*, 60 Cal. 2d 716, 36 Cal. Rptr. 488, 388 P.2d 720 (1964); *vacated on other grounds*

and remanded, 380 U.S. 194, *on remand*, 62 Cal. 2d 586, 43 Cal. Rptr. 329, 400 P.2d 321; Annot., 20 A.L.R.3d 363, 368. Appellant asks that this Court rule RSA 8:43 inapplicable to persons committed to the hospital pursuant to RSA 651:9. Such a holding would result in one group of patients, those committed through civil process, bearing a financial obligation that another group, those committed pursuant to RSA 651:9, would not have in spite of the fact that they all received the same care, treatment and maintenance. This would appear to be prohibited by the reasoning set forth in *McAuliffe* v. *Carlson*.

Appellant's argument that all individuals committed pursuant to RSA 607:3 and its successor RSA 651:9, are similarly situated is simply not supported by the facts. RSA 8:43 does not deal with commitment pursuant to RSA 607:3, its successor RSA 651:9, or any other provision of the law. Rather it deals with patients at the hospital and their financial obligation to the State for care, maintenance and treatment received at the hospital. It is true that all persons committed pursuant to RSA 607:3 and RSA 651:9 which provides in part that

> . . . the [superior] court, if it is of opinion that it will be dangerous that such person should go at large, may commit him to the prison or to state hospital. . . .**

have certain characteristics in common. But, the prison is a penal institution. It was not designed to provide programs of extensive psychiatric analysis and treatment whereas the hospital has been developed and is continuing to develop with just that purpose in mind. To be more specific, there are no psychologists on the prison staff and there are only two visiting psychiatrists who are available for a total of about one day per week but who do not usually consult with or treat the patients

---

**As a practical matter, commitments under this authority have been to the hospital except in those case in which the court concludes that the additional security afforded at the prison is necessary for the protection of the person and the public.

In 1975, RSA 651:9a was enacted. This section, which provides that commitment shall be to the hospital, not to the prison *or* hospital, shall take effect and RSA 651:9 shall be repealed upon certification by the superintendent of the New Hampshire Hospital that the forensic psychiatric unit building and equipment are completed and placed in operation. [Laws of 1975, Chapter 388, Section 8]

presently committed to the prison. Contrast this to the daily contact with psychologists, review and analysis by psychiatrists and the group therapy and other programs designed to lead to a gradual return to society available at the hospital, and it becomes obvious that those committed to the prison and those committed to the hospital are not similarly situated.

A person committed to the prison, where psychiatric and psychological treatment programs for the mentally ill are minimal and generally available only on an emergency basis, does not receive the same benefits the patient at the hospital receives. Furthermore, to charge one group of individuals at the prison for the same care and maintenance all other groups at the prison receive free would arguably constitute dissimilar treatment of those similarly situated.

In *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528,533, (1973) this Court held that

> [u]nder traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. [citations omitted]

Thus the Fourteenth Amendment does not deny to states the power to treat different classes of people in different ways. *Reed* v. *Reed*, 404 U.S. 71, 75 (1971); *Rinaldi* v. *Yeager*, 384 U.S. 305,309(1966).

Clearly, then, the legislature's determination that it is more desirable and beneficial to be committed to the hospital than to the prison is supported by the facts. *In the Matter of John H. Sargent* 116 N.H.____, 354 A.2d 404 (1976). It is also clear that the holding of the Supreme Court of the State of New Hampshire that there is a rational basis for not charging those confined to the prison pursuant to RSA 607:3 or its successor RSA 651:9 while imposing a financial obligation on those committed to the hospital through the same process, is supported by the law. *Id.; see State* v. *Clinch*, 108 N.H. 302, 234 A.2d 814 (1967).

B. THE RECORD DOES NOT AFFIRMATIVELY DEMONSTRATE THAT THE FEDERAL QUESTION WAS PRESENTED TO AND DECIDED BY THE STATE COURT

It has been well established that this Court will not decide federal constitutional issues raised before it for the first time on

review of state court decisions. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969).

In their opinion, the Supreme Court of the State of New Hampshire ruled against appellant's contention that the attempt by the State to recover expenses for board and care furnished at the New Hampshire Hospital during a person's commitment there pursuant to an order of the Superior Court violates that person's constitutional right to equal protection of the law. The specific discrimination alleged by appellant in support of his equal protection argument does not appear in either the question transferred nor in the court's opinion, but the court does note that appellant's arguments had been decided adversely to him *In the Matter of John H. Sargent*, decided the same day.

In that opinion, the court stated that they were faced with the contention that application of RSA 8:43 violates the constitutional guarantee to equal protection of the laws since in its operation, it discriminates against those criminally incarcerated at the hospital in extracting the cost of commitment at the hospital while not doing so for those first committed to the prison and then transferred to the hospital. In finding no denial of equal protection, the court held that all patients at the hospital, whether committed directly or by way of the prison, would be treated equally because they were all patients within the meaning of RSA 8:43. It is clear from a careful review of that decision, as modified by the court upon denial of appellant's motion for rehearing, that the question presented by appellant in this appeal was not properly presented below and is not now a properly presented federal question.

In support of jurisdiction, appellant includes certain excerpts from his brief before the state court as Appendix C. But this Court has held that briefs and oral arguments before state courts cannot be used to establish that a federal question was raised. *Live Oak Ass'n.* v. *R.R. Commission*, 269 U.S. 354, 357-8 (1926); *Lynch* v. *New York*, 293 U.S. 52, 54 (1934). Under the circumstances, this appeal should be dismissed for want of a properly presented substantial federal question.

C. THIS APPEAL IS OF DOUBTFUL VALUE AS A PRECEDENT

Appellant contends that the question presented is substantial. He does not, however, allege, nor give any evidence to

support a finding of broad precedential value. The Jurisdictional Statement is conspicuously silent with respect to criminal commitment schemes in other jurisdictions and with respect to conflicting decisions in this or other jurisdictions, the presence of which might indicate a need for clarification. Indeed, in New Hampshire, the legislature has already finalized the steps which will shortly result in the termination of the use of the prison as a maximum security holding area for the most dangerous of those committed pursuant to RSA 651:9. When the forensic unit is completed, not only will commitments to the prison terminate, but those already committed to the prison will be transferred to the hospital where they too will benefit from the treatment available there. For these reasons, this case would not have broad precedential value.

CONCLUSION

Appellee respectfully submits, therefore, that the appellant presents no substantial federal question, properly presented below, for review by this Court, and that this appeal should be dismissed or, in the alternative, that the judgment and decree of the Supreme Court of the State of New Hampshire should be affirmed.

Respectfully submitted,

David H. Souter
Attorney General

Roger G. Burlingame
Assistant Attorney General

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I, Roger G. Burlingame, Counsel for Appellee and a member of the bar of this Court, do hereby certify that in accordance with Rule 33, three copies of Appellee's Motion to Dismiss or Affirm were served this day by mailing them, first flass, postage prepaid, to Daniel J. Connolly, Counsel for Appellant, at 41 South Park Street, Hanover, New Hampshire, said address being within 500 miles of the point of mailing.

.....

Roger G. Burlingame
Assistant Attorney General